



2033 North Main Street, Suite 800
PO Box 8035
Walnut Creek, CA 94596-3728
925.930.6600
925.930.6620 (Fax)

PETER W. MCGAW
pmcgaw@archernorris.com

August 23, 2005

BY FACSIMILE AND MAIL

Ms. Wendy Cohen
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, California 95670-6114

Re: Draft Resolution to Amend the Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands Within the Central Valley Region (Resolution No. R5-2003-0105)

Dear Ms. Cohen:

This letter is submitted on behalf of the Turlock Irrigation District (TID) for the purpose of commenting on the proposed Draft Resolution to Amend the Conditional Waivers of Waste Discharge Requirements for Discharges from Irrigated Lands Within the Central Valley Region, scheduled for hearing before the Regional Board on September 15 and 16, 2005. In particular, TID would like to comment on several issues raised by the proposed "Attachment A2," as follows:

1. The Regional Board should consider the full implications of the decisions embodied in Attachment A2 on other regulatory programs

Attachment A2 states, "[it] is intended solely as clarification of the Conditional Waivers and does not have any other regulatory effect." (Attachment A2, Page 1). TID questions how this statement fits with the need for consistency in regulatory activities. Indeed, TID wonders whether the Regional Board has the authority to limit the determinations embodied in Attachment A2 (many of which are commented on below) to a specific regulatory program without considering the foreseeable impact on other programs. Many of the decisions embodied in Attachment A2 reflect determinations of the jurisdictional and regulatory status of particular waterbodies. How can the Regional Board disregard the precedent established by Attachment A2? On the other hand, if the Board acknowledges it will need to be consistent with Attachment A2 in future regulatory activities (e.g., the regulation of discharges into agricultural waterways for which beneficial uses have never before been established), how does it justify not considering the impacts on those other foreseeable regulatory activities? TID believes the Regional Board

must consider the *full* ramifications of the decisions reflected in Attachment A2 without limiting it to the Conditional Waiver program.

2. The wording of the proposed Attachment A2 is ambiguous in its use of the term “constructed agricultural drain.”

Many of the facilities operated by TID and other irrigation districts are better characterized as “canals” rather than “drains.”¹ Although these canal facilities may carry some incidental agricultural runoff, the canals are constructed facilities whose principal purpose is to convey water for irrigation. In some cases, canals may follow pre-existing natural channels, in other cases they may intercept natural channels but then convey water in a different direction (and downstream channels may have been filled long ago), and in some cases they may convey water along a route where no water flowed historically. The flow in canals is largely managed to supply irrigation water to fields. Thus, the flow can be intermittent and, from time to time might be cut off completely (e.g., when performing maintenance). By categorizing all waterbodies as either “constructed agricultural drains” or “streams” (i.e., natural waterways or channelized natural waterways), the proposed Attachment A2 is unclear as to the status of constructed canals and other constructed waterbodies that are not “constructed agricultural drains.”

Moreover, the supply water flowing in the canals is not a “waste discharged from irrigated lands.” To the extent the canals receive incidental agricultural runoff, they are simply the recipients of discharges of waste by others. (Similarly, agricultural drains simply receive discharge from others, often combined with percolating groundwater and unused irrigation water (“operational spills”), both of which are *not* waste.) Mere operation of canals – or drains – does not require the preparation of a Report of Waste Discharge (Water Code section 13260(a)) and therefore should not require either Waste Discharge Requirements or participation in the Conditional Waiver program.

Nonetheless, the Regional Board staff have clearly indicated their intent to include both canals and drains in the Conditional Waiver program. If this is indeed the Regional Board’s intent, that intent should be clearly stated, perhaps by changing the term “constructed agricultural drains” to “constructed agricultural waterways.” The definition of this latter term would be “a

¹ A “drain” is generally used to remove excess water, as distinguished from a “canal” or other water supply conveyance. (Compare, “Canal — A constructed open channel for transporting water from the source of supply to the point of distribution” (*Water Words Dictionary*, Nevada Division of Water Resources Department of Conservation and Natural Resources (<http://water.nv.gov/Water%20planning/dict-1/wwords-c.pdf>)) to “Drain — (1) To draw off (a liquid) by a gradual process. (2) A buried pipe or other conduit (closed drain) for the conveyance of surplus groundwater. (3) A ditch or canal (open drain) for carrying off surplus surface water or groundwater. (4) A system to control water tables near the ground surface to maintain levels at or below specified depths.” *Water Words Dictionary*, Nevada Division of Water Resources Department of Conservation and Natural Resources (<http://water.nv.gov/Water%20planning/dict-1/wwords-d.pdf>))

constructed surface waterbody with the primary purpose of conveying irrigation water or drainage water to or from agricultural operations.”²

3. The Board should not use a “clarification” to expand the term “stream” beyond the customary usage.

The term “stream,” as used in the “tributary statement,”³ is not defined in the Basin Plan. Instead, proposed Attachment A2 would define the term “stream” to include essentially all areas where water may have collected – even intermittently – at any time in the past. How far back in time does one look? In prehistoric times, the entire Central Valley was a large lake, which drained over thousands of years. That topography of the Central Valley has been modified over the past 100+ years by actions designed to make the land suitable for farming and other activities. The vast majority of these actions have been approved, and indeed encouraged, by the state and federal governments. At which point in time does the Regional Board believe a waterway must have been in a “natural” state to be deemed a “channelized stream?” If the Regional Board is going to assert that a particular waterway is, in essence, a “natural” stream that has simply been “channelized,” it needs to be clear as to when this natural waterway must have existed prior to channelization.

Moreover, the term “stream” implies a regular presence of water and a flow of that water from one location to another in a well-defined channel. TID knows of no evidence that the Regional Board considered the presently proposed definition of “stream” when it used that term

² TID has intentionally not incorporated the phrase presently in Attachment A2, “constructed in a location where no natural water body existed prior to the construction activity,” in its suggested definition. As explained in the next comment, TID believes this phrase improperly excludes from the definition of “constructed agricultural drain (or waterway)” facilities that have existed for decades and have never been considered the equivalent of “natural streams” for regulatory purposes or in any common usage.

³ TID uses the term “tributary statement,” rather than “tributary rule,” because it believes that the Basin Plan clearly states that the application of downstream beneficial uses to upstream tributary waterbodies is simply a generalized “starting point” for a beneficial use analysis, not a “rule.” TID believes the Regional Board’s current interpretation of the tributary statement, requiring a separate Use Attainability Analysis and Basin Plan Amendment to “de-designate” beneficial uses in undesigned upstream tributaries, turns much of the full tributary statement language into surplusage. TID is aware that this issue is currently in litigation (*Vacaville and California Association of Sanitation Agencies v. State Water Resources Control Board*). So as to not unduly duplicate Board records, TID requests the Board take administrative notice of its records pertaining to the *Vacaville* litigation and TID incorporates here those portions of the *Vacaville* record pertaining to this issue. TID does note that the Regional Board’s current interpretation is diametrically opposed to its interpretation at the time it adopted the particular language of the tributary statement. See letter dated 31 August 2000 from Jerrold A. Bruns, Central Valley RWQCB, to Kathy Goforth, USEPA, attached. TID believes a formal section 13241 analysis must be performed before beneficial uses may designated and water quality objectives established for any stream or waterbody that is not formally designated in the Basin Plan.

in the tributary statement in the Basin Plan. TID urges the Regional Board to acknowledge a more widely recognized definition of "stream," such as that found in the USGS Water Science Glossary of Terms: "stream – a general term for a body of flowing water; natural water course containing water at least part of the year. In hydrology, it is generally applied to the water flowing in a natural channel as distinct from a canal."⁴

By defining the term "stream" for the first time, and particularly by adopting a definition that is significantly different from the definition generally recognized, the Regional Board is adopting a rule of general application that carries with it consequences for other regulatory actions that have not been considered. This action is clearly a rulemaking that requires compliance with both the Water Code and the Administrative Procedure Act.

The term "stream," as used in the "tributary statement," should be limited to those watercourses that remain in their natural state today. Other waterbodies, including those that have been entirely constructed and those that approximate the location of pre-existing waterways but which have been substantially modified so that they no longer exhibit the characteristics of natural waterways, should be dealt with separately from a regulatory standpoint.⁵

4. Attachment A2 would establish beneficial uses for previously undesignated waterbodies without a proper analysis.

Attachment A2 acknowledges that, at the very least, waterways that are not natural streams or "channelized" natural streams are not included within the Regional Board's interpretation of the "tributary statement." (Attachment A2, page 3). Although Attachment A2 suggests there may be other ways in which beneficial uses may have been designated for some of these "constructed" waterways, it does not address constructed waterways that do not fit within any of these alternative "designation" processes. Thus, the "clarification" fails to address the ambiguity of the original Conditional Waiver identified by the Sacramento County Superior Court.

In addition, beneficial uses cannot be "designated" by the processes described in items (3) through (5) on page 3 of Attachment A2. TID's concern regarding "method (3)" (the tributary statement) has been discussed above in footnote 2. With respect to "method (4)," (designation by operation of law), the federal Clean Water Act does not designate beneficial uses. The "fishable/swimmable" goals under the Clean Water Act are not "designated beneficial

⁴ <http://ga.water.usgs.gov/edu/dictionary.html#S>

⁵ In some urban areas, for example, natural creeks have been entirely encased in culverts for miles and are completely covered by roads, houses and businesses. In other areas, channels have been "hardened" with riprap or concrete for flood control purposes. Much of this activity has occurred with the full blessing of regulatory agencies. To attribute the characteristics of a "natural" stream to a culvert or other heavily-modified waterway without a full understanding of the condition of the particular waterway and the steps that would be necessary to support certain beneficial uses fails to comply with the legislative mandate of section 13241.

uses" – they are merely *goals*. The Clean Water Act states "it is the national *goal* that *wherever attainable*, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved . . ." (33 U.S.C. § 1251(a)(2) (emphasis added). Rather than purporting to establish these goals as "beneficial uses," the Clean Water Act instead delegates to the *states* the role of designating beneficial uses and developing water quality criteria. (33 U.S.C. § 1313.) The Clean Water Act does not, by "operation of law" or otherwise, designate beneficial uses for any water bodies.

With regard to "method (5)" (preexisting beneficial uses),⁶ the Antidegradation Policy clearly did not "designate" beneficial uses for particular waterbodies. Designation of beneficial uses is a hydrographic-unit specific determination,⁷ which clearly was not done during the process of adopting the Antidegradation Policy. Moreover, reliance on the Antidegradation Policy to establish beneficial uses under the Conditional Waiver does not allow the regulated community to know which beneficial uses and water quality objectives the Regional Board considers to be applicable to a particular waterbody. The California Administrative Procedure Act requires that every regulation conform to the standards of necessity, authority, clarity, consistency, reference, and nonduplication set forth in subdivision (a) of Government Code Section 11349.1. Government Code Section 11349(c) defines "clarity" as, " . . . written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." Reliance on "method (5)" to designate beneficial uses and apply water quality objective to particular waterbodies lacks clarity, in violation of the Administrative Procedures Act.

Water Code section 13241 specifically requires a formal determination of the "past, present, and probable future beneficial uses" when establishing water quality objectives applicable to a particular waterbody. Section 13241(a). To the extent that Attachment A2 purports to establish beneficial uses for waterbodies not previously designated by a formal, basin-planning process (i.e., methods (1) and (2)), it circumvents the water-body-specific analysis required by section 13241.

5. Attachment A2 would improperly extend existing water quality objectives to waterbodies for which they were never intended and for which they have never been properly adopted.

Section 13000 requires that all water quality regulation be reasonable. Section 13241 puts teeth in this general legislative statement by setting out specific requirements that must be followed when establishing water quality objectives applicable to particular waterbodies. As

⁶ "Method (5)" states, "beneficial uses that actually exist in a water body, or have existed since at least 1975, must generally be protected even if they are not formally designated in a [plan or policy.]" (Attachment A2, Page 3, Item (5)).

⁷ One of the factors that must be considered when establishing Water Quality Objectives is the "Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto." Section 13241(b).

noted above, the establishment of water quality objectives is specific to the particular hydrographic unit in question. Having never formally "designated" the waterways in question here, the Basin Plan did not, and could not, have established water quality objectives for those waterways. Indeed, as the Superior Court recognized:

"Factors to be considered in establishing WQOs must include the 'past, present, and probable future beneficial uses of water.' Without the benefit of beneficial use assessments, it is unclear whether the Board has established WQOs -- *or how it properly could have established WQOs* -- for many of the agricultural channels that receive discharges from irrigated lands."

(*DeltaKeeper/California Farm Bureau v. SWRCB*, Trial Court Decision, Page 26, emphasis added).⁸

There has never been a formal determination, following a full consideration of the section 13241 factors, that applying the water quality objectives identified in the Conditional Waiver to previously-undesignated waterways. Without such a determination, application of these water quality objectives to agricultural waterbodies is improper. The rote application of "generic" water quality objectives to these waterbodies is unreasonable, and bypasses the analysis required by 13241.⁹

In conclusion, Attachment A2 is much more than just a "clarification." Attachment A2 purports to designate beneficial uses for waterways for which beneficial uses have never before been designated, and then applies existing water quality objectives, developed for other waterbodies, based on those beneficial uses. Nowhere is there an evaluation of whether those water quality objectives are reasonable *as applied to these newly designated waterbodies*. The adoption of Attachment A2 would violate the Administrative Procedure Act and the Water Code by rulemaking without following proper procedures or going through a proper analysis of the important factors identified in Water Code section 13241.

⁸ Similarly, the "tributary statement" could not have designated beneficial uses for agricultural waterways that may be tributary to federal waterbodies, since this theory of federal jurisdiction was never articulated by the Regional Board until the *Talent Irrigation District* decision was published. Certainly, the Regional Board's administrative record for the Basin Plan adoption does not reflect any such consideration. There was not, and could not have been, a proper section 13241 analysis of applying downstream beneficial uses to upstream agricultural waterbodies at the time the tributary statement was incorporated into the Basin Plan.

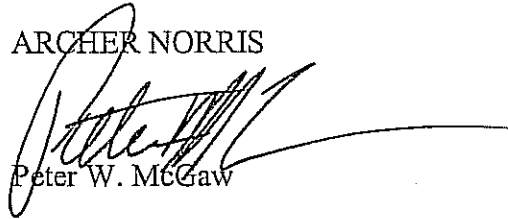
⁹ Indeed, if the Regional Board finds some of the Basin Plan's water quality objectives *do* apply to certain waterbodies even though there was never any section 13241 analysis for those particular waterbodies, the validity of the water quality objectives themselves is put in doubt.

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Thank you for this opportunity to comment of behalf of the Turlock Irrigation District.
Should you have any questions regarding these comments, please do not hesitate to contact me.

Very truly yours,

ARCHER NORRIS

A handwritten signature in black ink, appearing to read "Peter W. McGaw", with a long horizontal flourish extending to the right.

Attachment: Letter from Jerrold A. Bruns, CVRWQCB, to Kathy Goforth, USEPA, dated 31
August 2000



California Regional Water Quality Control Board

Central Valley Region

Steven T. Butler, Chair

Winston H. Hickox
Secretary for
Environmental
Protection

Sacramento Main Office
Internet Address: <http://www.swrch.ca.gov/~rwqch5>
1443 Roubier Road, Suite A, Sacramento, California 95827-3003
Phone (916) 255-3000 • FAX (916) 255-3015



Gray Davis
Governor

31 August 2000

Kathy Goforth
US Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 95812-0100

RESPONSE TO US EPA ACTIONS ON BASIN PLAN AMENDMENTS

We have reviewed the letter from US EPA to State Water Resources Control Board that takes action on Basin Plan amendments that were adopted by the Regional Board in 1989, 1990, 1994 and 1995. We may submit additional comments next week to further clarify some of our points. We are concerned that US EPA has taken so long to act on these amendments, especially since US EPA proposes to disapprove some elements even though no significant adverse comments were received from US EPA during the adoption process. Following are responses to US EPA determinations.

Attachment A Disapproved Provisions

1. Tributary Footnote

US EPA suggests that the footnote on Table II-1, adopted in 1975, actually designates beneficial uses for water bodies tributary to those listed on Table II-1. US EPA, therefore, proposes to disapprove the language added in 1994 to the Basin Plan because they view this as a change from what was stated in 1975.

We do not agree with the analysis and assumptions that are included in US EPA's proposed disapproval of the amendment. The footnote was included on Table II-1 to help the regulated community understand that, in the absence of information to the contrary, the Regional Board would assume that streams had the same beneficial uses as the named water bodies to which they are tributary. Dischargers or other interested parties had the opportunity to conduct studies and present information demonstrating what beneficial uses were appropriate. The Basin Plan could then be amended to reflect the beneficial uses that were appropriate for the water body in question. In a March 1978 letter from US EPA to State Board this issue is discussed and it is clear that the state position is that the Regional Board did not intend to apply the "general rule" to designate beneficial uses to all waters tributary to the listed waters. At the time US EPA did not agree with this interpretation, but the Regional Board did not make any agreements with US EPA that contradicted this position.

The tributary footnote was not meant to designate beneficial uses and it was not meant to be applied rigidly in a manner that ignored available information. There are so many obvious examples where tributaries do not have the same beneficial uses as the downstream named receiving water, that it is

California Environmental Protection Agency

inconceivable that the Regional Board, in adopting the footnote, intended it to be used in the manner US EPA suggests is appropriate. Following are a few examples of obvious cases where the footnote language just does not make sense if it is applied as US EPA suggests:

- The Sacramento River and Delta have navigation as a beneficial use. Navigation is defined as uses of water for shipping, travel, or other transportation by private, military, or commercial vessels. Virtually none of the tributaries could possibly have this beneficial use, but according to US EPA it is designated.
- The San Joaquin River has migration and spawning for cold water species as beneficial uses. Agricultural drains, such as Orestimba Creek, Del Puerto Creek, Ingram-Hospital Creek, and others could not possibly have these beneficial uses.

When the tributary footnote was included in the Basin Plan in 1975, the Regional Board knew that the beneficial uses that were listed for the named water bodies were not always appropriate for the tributaries. It was assumed that when information became available, it would be used to determine actual beneficial uses.

The language added in 1994 to the Basin Plan was meant to clarify how the Regional Board identifies which beneficial uses are appropriate in the tributaries. This language clarified the method that had been implemented since adoption of the Basin Plan in 1975. Therefore, it is unclear what affect US EPA disapproval of the 1994 language will have on the way the Regional Board determines beneficial uses. The Regional Board still intends to make site specific determinations and amend the Basin Plan to include them. Disapproval will remove the clarification and potentially be a disservice to readers of the Basin Plan.

2. Dissolved Oxygen

In the editing that was done as part of the 1994 Basin Plan amendment, some of the dissolved oxygen provisions were misplaced. No changes in the objectives were intended and during the next printing of the Basin Plan the wording will be restored to the way it was prior to the 1994 editing.

3. Federal Antidegradation

In the 1989 amendments to the Basin Plan, the Regional Board added a section to explain the federal antidegradation policy. Staff was intending to present a factual account of the policy for public information. No special interpretations or manipulations were intended. US EPA does not agree with the way staff explained the policy. Unfortunately, US EPA did not tell us this 10 years ago when it was adopted, so 10 years of bad information has been provided to the public. We will consider US EPA recommendations for appropriate wording during the next triennial review.

Attachment B Understandings

The understandings are acceptable with the exception of the following:

5. US EPA states that it is their understanding that the MUN beneficial use is designated for all water bodies in the Region. This would include the water bodies listed in Table II-1 that currently do not have the MUN beneficial use designated and all the unnamed tributaries.

We do not agree with this understanding. The Sources of Drinking Water Policy specified that all waters of the state should be considered suitable or potentially suitable for MUN with certain exceptions. One of these exceptions allowed the Regional Board discretion on whether or not to add the MUN designation for water bodies that already had designated uses that did not include MUN. In 1975, the Regional Board specifically designated beneficial uses for the water bodies listed in Table II-1. Some of the water bodies listed in Table II-1 were specifically not designated for the MUN beneficial use. The adoption of the Sources of Drinking Water Policy did not change these designations. However, we agree with US EPA that most of the water bodies listed in Table II-1 should be designated as MUN. We will commit to updating our MUN designations for water bodies listed in Table II-1 during the next Triennial Review.

We agree that the Sources of Drinking Water Policy would apply, in general, to the unnamed tributaries because these have never formally had beneficial uses designated for them. The Regional Board will implement the Sources of Drinking Water Policy when developing permits and determining permit limits for discharges to the unnamed tributaries. We do not agree that this policy designates beneficial uses as defined in the Clean Water Act.

6. We are not sure what US EPA's position is when agencies, acting under their respective state regulations, apply pesticides or herbicides for vector and weed control, pest eradication, or fishery management. The Regional Board does not intend to adopt basin plan amendments every time any of these proposed activities are proposed or implemented. The intent of the variance described in the Basin Plan for these types of applications is to allow quick implementation of emergency projects to control undesirable and dangerous species. Often these projects involve short-term toxicity within affected waters. Because of the urgent nature of these projects, the Regional Board has not prescribed waste discharge requirements nor re-evaluated the water quality objectives of the affected waters. The term, "variance", as used in our Basin Plan, was not intended to have the same meaning as the term does in the Clean Water Act (that relates to variances of water quality standards).

Attachment C Issues That Should Be Addressed in the Next Triennial Review

US EPA has identified 13 issues that they believe should be addressed in the next Triennial Review. The Regional Board will consider US EPA recommendations along with suggestions and recommendations from other stakeholders. Many of the issues that are identified would take significant staff resources to address. During the last Triennial Review, more than 70 issues were identified. The Regional Board has less than 1 py for basin planning work. Without budget augmentations, most of US EPA's issues will likely not be addressed. Following are comments on a few of US EPA's issues:

5. Appropriate portions of TMDLs will be incorporated into Basin Plans according to time schedules included in federal and state workplans.

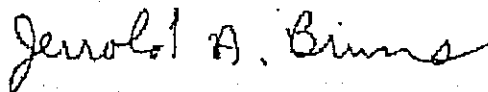
8. Staff will propose language to be included in the Basin Plan to reflect "the Alaska Rule" when a new addition is published.

Response to US EPA Basin Plan Actions

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31 August 2000

If you have comments or questions regarding our responses, please call me at (916) 255-3093.



JERROLD A. BRUNS

Sacramento River Watershed Section